

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 11, 2001 Session

**IMAGE OUTDOOR ADVERTISING, INC. v. CSX TRANSPORTATION,  
INC., ET AL.**

**Appeal from the Chancery Court for Davidson County  
No. 00-2644-I : No. 00-1906-I    Irvin H. Kilcrease, Jr., Chancellor**

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**No. M2000-03207-COA-R3-CV - Filed June 10, 2003**

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These cases were consolidated pursuant to Tenn. R. App. P. 16(b). Both involve a dispute regarding the permitting of outdoor advertising billboards pursuant to the Tennessee Billboard Regulation and Control Act of 1972. Tenn. Code Ann. § 54-21-101 et seq. Image Outdoor Advertising, Inc. sought declaratory and injunctive relief against Lamar Advertising Company, Infinity Outdoor, and CSX Transportation, Inc. following the denial of its permit application by the Tennessee Department of Transportation. The trial court found no private right of action exists to enforce the Tennessee Billboard Act and that Image had failed to exhaust the administrative remedy statutorily required as a prerequisite to its seeking declaratory relief. We affirm the trial court's dismissal of Image's complaint for failure to state a claim upon which relief could be granted. The other case involves allegations that counsel for Image breached his fiduciary duty to Lamar, a former client, by using confidential client information in forming Image, a competitor sign business, and then representing Image. The trial court dismissed Lamar's complaint for failure to state a claim upon which relief could be granted. We affirm.

**Tenn. R. App. P. 3 Appeals as of Right; Judgments of the Chancery Court  
Affirmed and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN, J. and JOHN J. MADDUX, JR., SP. J., joined.

Lawrence P. Leibowitz, Melissa A. Ashburn, Knoxville, Tennessee, for the appellant, Lamar Advertising Company.

Ralph W. Mello, Brentwood, Tennessee, for the appellees, Image Outdoor Advertising, Inc. and Ralph W. Mello.

Michael E. Evans, Nashville, Tennessee, for the appellee Infinity Outdoor, Inc.

Gareth S. Aden, Jack W. Robinson, Jr., Nashville, Tennessee, for the appellees, CSX Transportation, Inc., and CSX Real Property, Inc.

## OPINION

These two cases were consolidated for the purposes of argument, consideration and disposition pursuant to Tenn. R. App. P. 16(b). The triggering event for the litigation was the denial by the Tennessee Department of Transportation (“TDOT”) of an application for a permit to erect a billboard filed by Image Outdoor Advertising, Inc. (“Image”) because the proposed sign was too close to pre-existing billboards permitted to Lamar Advertising Company (“Lamar”), and Outdoor Systems, Inc., a/k/a Infinity Outdoor (“Infinity”).

At the time of the denial, Image did not pursue any administrative remedy for the denial of the permit or raise any questions with TDOT about the validity of the existing permit(s) that prevented the granting of its application. Instead, within a week of the permit denial, Image filed suit in Davidson County Chancery Court (Case No. 00-1906-I) seeking declaratory and injunctive relief against CSX Transportation, Inc. and CSX Realty, Inc. (“CSX”), Lamar, and Infinity.

Image alleged that CSX’s business practice of leasing a portion of its railroad right-of-way to Lamar and Infinity for the purpose of erecting billboards was unlawful. The complaint alleged that CSX had no legal right to license a portion of its railroad right-of-way to Lamar and Infinity and that both Lamar and Infinity had either intentionally or negligently misrepresented that CSX was the property owner on their billboard permit applications submitted in 1997 and 1998. Specifically, Image alleged that its billboard permit was denied by the TDOT because its proposed site was within 1000 feet of the billboard permits improperly issued to Lamar and Infinity. As a consequence of this allegedly unlawful leasing practice, Image maintained it was unable to fairly compete for billboard sites which would satisfy TDOT rules for permitting.

Image requested that the trial court enjoin CSX from licensing its railroad right-of-way to outdoor sign companies such as Lamar and Infinity; order the removal of all unlawfully permitted billboards throughout Tennessee; find Lamar and Infinity’s agreements with CSX to be illegal and their permits from TDOT “false”; and order that in the future Lamar and Infinity be required to obtain the permission of the property owner prior to erecting billboards.

CSX filed a Motion to Dismiss the complaint pursuant to Tenn. R. Civ. P. 12.02 for lack of jurisdiction over the subject matter and for failure to state a claim for which relief could be granted. Lamar joined in CSX’s motion, and Infinity filed its own motion to dismiss, adopting CSX’s memorandum of law. Specifically, the defendants argued that the Billboard Act creates no private right of action which Image is entitled to enforce. They further argued that any concerns Image had regarding the legality of CSX’s leasing arrangement with Lamar and Infinity should have been raised at the administrative level before TDOT.

Lamar also later filed an answer and counter complaint against Image and a third party complaint against Ralph W. Mello. Lamar alleged that Image was a recently chartered corporation owned wholly by Mr. Mello and his family; that Mr. Mello is an attorney licensed in the State of Tennessee; and that in the past Mr. Mello had represented Lamar in a small number of condemnation

actions brought in Davidson County from 1997 through 1999. Lamar averred that Mr. Mello breached his fiduciary duty owed the company by going into direct competition with Lamar and further alleged that Mr. Mello had used confidences and secrets of Lamar for his own financial gain. Lamar sought to be indemnified by the third party defendant, Mr. Mello, for any damages incurred by Lamar as a result of the claims asserted by Image.

Shortly after the filing of the counter and third party complaint, the court entered Image's Notice of Voluntary Dismissal of its complaint. Image and Mr. Mello then filed a joint Motion to Dismiss both the counter complaint against Image and the third party complaint against Mr. Mello. The trial court granted Mr. Mello's and Image's Motions to Dismiss on the grounds that Lamar failed to state a claim upon which relief could be granted. It is from this dismissal that Lamar appeals Case No. 00-1906-I.

Within days of taking the non-suit in Case No. 00-1906-I, Image filed virtually the identical complaint in Davidson County Chancery Court, which was assigned Case No. 00-2644-I,<sup>1</sup> against CSX, Lamar, and Infinity for declaratory and injunctive relief. Image inserted the following "Preface:"

This action is not brought under the Highway Beautification Act; does not seek to enforce the Highway Beautification Act; does not challenge the Tennessee Department of Transportation's denial of a permit to Plaintiff; does not ask the Court to direct the issuing of a billboard permit to Plaintiff. The complaint simply seeks a declaration that the CSX Railroad has no legal right to license the erection of billboards upon its right-of-way (land on which they do not own the fee), and asks for injunctive relief requiring the defendants to terminate the illegal license agreements and remove the illegal billboards in order that Plaintiff's right to pursue its lawful business is not harmed, thwarted or impeded by the illegal activities of the defendants.

CSX moved to dismiss for failure to state a claim upon which relief could be granted. At the hearing on the motion, the trial court ruled from the bench, dismissing Image's complaint against CSX, finding Image had failed to state a claim. The trial court entered its order dismissing the claims against CSX shortly thereafter.<sup>2</sup>

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<sup>1</sup>This case was originally assigned to Davidson County Chancery, Part II, but was transferred to Part I following Lamar's Motion to Transfer pursuant to local rule. At the time of the Motion, the counter claims were still pending in Part I in Case No. 00-1906-I.

<sup>2</sup>Infinity moved to dismiss the case pursuant to Tenn. R. Civ. P. 12 and adopted CSX's memorandum of law in support of the motion. Infinity's motion to dismiss was granted due to Image's failure to respond as required under the local rules. After the order dismissing the action against CSX was entered, Lamar moved for summary judgment. The trial court granted that motion after denying Image's motion to alter or amend the order dismissing CSX and after Image had submitted a proposed order dismissing that claim, since it appeared to the court that Image did not oppose the grant of summary judgment and because Image could not take a nonsuit due to the pendency of Lamar's

(continued...)

Within thirty days of entry of the order of dismissal, Image filed a motion to alter or amend the judgment pursuant to Tenn. R. Civ. P. 59.04 on the grounds that Image had stated a cause of action and that TDOT had no jurisdiction to issue the declaratory judgment and injunctive relief sought in this case. In its reply to CSX's response to the motion to alter or amend, Image argued the CSX was incorrect in asserting that this matter should have been brought before TDOT. Image asserted that the Commissioner of Transportation had declined to issue a declaratory order, when requested by Image after the trial court's dismissal of CSX in this case, on the basis he had no jurisdiction or authority to do so. Attached to Image's reply was a petition to the Commissioner, filed after the trial court's ruling, asking for a declaratory order that CSX has no legal right to lease its right of way for the erection of billboards and for an injunction requiring CSX to terminate all such leases and enjoining CSX from entering into such leases in the future.

Also attached was a response from the Commissioner stating that there was no citation in the petition to any statute, rule or order within the jurisdiction or authority of the Department as required by Tenn. Code Ann. § 4-5-223(a) which provides that an "affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule or order within the primary jurisdiction of the agency." The Commissioner further stated that the petition requested a declaratory judgment concerning a matter of property law. Consequently, the Commissioner declined to issue a declaratory order.<sup>3</sup>

The trial court denied Image's motion to alter or amend the October 17 judgment dismissing claims against CSX. Image appeals from the denial of the motion and the dismissal of its claims against CSX. The trial court's orders dismissing Infinity and granting Lamar's summary judgment motion were not appealed.

## I. STANDARD OF REVIEW

The trial court resolved both cases herein by granting motions to dismiss pursuant to Tenn. R. Civ. P. 12.02(6). This motion tests the legal sufficiency of the plaintiff's pleading. *Givens v. Mullikin*, 75 S.W.3d 383, 406 (Tenn. 2002); *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). It requires the court to review the complaint alone, *Mitchell v. Campbell*, 88 S.W.3d 561, 564 (Tenn. Ct. App. 2002), and to look to the complaint's substance rather than its form. *Kaylor v. Bradley*, 912 S.W.2d 728, 731 (Tenn. Ct. App. 1995). Dismissal under Tenn. R.

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<sup>2</sup>(...continued)  
motion.

<sup>3</sup>Both Tenn. Code Ann. § 4-5-224(b) and The Uniform Rules of Procedure for Hearing Cases Before State Administrative Agencies, Chapter 1360-4-1-.07(3) direct the aggrieved party to include the agency rule, order or statutory provision on which the declaratory order is sought. The rule further requires a statement of facts of the controversy and description of how this rule, order or statute affects or should affect the Petitioner. Neither was included in Image's petition. Absent from the petition was a citation to either the Billboard Act or TDOT's regulations for Control of Outdoor Advertising and any explanation of how Image had been affected by any order, ruling, interpretation or application of the law by the Department.

Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief, *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002) or when the complaint is totally lacking in clarity and specificity. *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Davis v. The Tennessean*, 83 S.W.3d 125, 127 (Tenn. Ct. App. 2001); *Pendleton v. Mills*, 73 S.W.3d 115, 120 (Tenn. Ct. App. 2001). Accordingly, courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997), and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. ROBERT BANKS, JR. & JUNE F. ENTMAN, TENNESSEE CIVIL PROCEDURE § 5-6(g), at 254 (1999). We must likewise review the trial court's legal conclusions regarding the adequacy of the complaint without a presumption of correctness. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999); *Stein v. Davidson Hotel Co.*, 945 S.W.2d at 716.

We begin with the trial court's dismissal of Image's complaint against CSX, presume that the factual allegations in the complaint are true, and review the trial court's legal conclusion that Image failed to state a claim for relief.

## **II. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

In its order entered October 17, 2000, the Court explained the reason for the dismissal:

The gravamen of Image's Complaint and Amended Complaint is the alleged wrongful issuance of billboard permits by the Tennessee Department of Transportation or its Commissioner. Image does not allege that it has sought a declaratory order and/or declaratory judgment from the Tennessee Department of Transportation or its Commissioner and takes the position that it is not necessary for it to first seek such an order or judgement. . .

The trial court was referring to the requirements of Tenn. Code Ann. § 4-5-225(b), part of Tennessee's version of the Uniform Administrative Procedures Act ("UAPA"), which provides:

A declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order.

The legislative intent that the UAPA apply to all administrative boards and agencies is unmistakably clear.<sup>4</sup> *United Inter-Mountain Tel. Co. v. Public Service Comm.*, 555 S.W. 2d 389 (Tenn.1977). The UAPA sets out the statutory prerequisites for seeking review of an agency's actions through declaratory judgment proceedings. *Davis v. Sundquist*, 947 S.W.2d 155,156 (Tenn. Ct. App. 1997). A declaratory judgment action is premature if the petitioner proceeds directly to judicial review without seeking an administrative determination. *Id.*; *Hall v. McLesky*, 83 S.W.3d 752, 757 (Tenn. Ct. App. 2002).

When a statute mandates an administrative remedy, one must exhaust this administrative remedy before seeking judicial relief. *Pendleton v. Mills*, 73 S.W.3d 115, 130-31 (Tenn. Ct. App. 2002); *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn. 1997). In the instant case, Image was first required to seek a declaratory order,<sup>5</sup> and its failure to do so precluded the judicial relief it sought.

Image asserted in the trial court, and continues to assert in this appeal, that its lawsuit was not based upon the denial of its permit application, but was instead based on property interests. That argument, however, disregards the fact that, without the permit denial, Image would have no standing to bring this lawsuit. It has no legally cognizable interest in how any of the defendants conduct their business unless that conduct adversely affects Image.

To establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury, (2) that the injury was caused by the challenged conduct, and (3) that the injury is apt to be redressed by a remedy that the court is prepared to give.

*Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992). According to the allegations in its complaint, Image alleges it has been harmed by its inability to get permits to erect billboards because of existing permits that Image alleges were issued or obtained improperly or in violation of legal requirements.

The trial court's questioning of Image's counsel during the hearing on CSX's motion to dismiss highlights the concerns that the court had with Image's failure to take its complaints to TDOT and the connection between the administrative procedures and the relief requested by Image:

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<sup>4</sup>The term "agency" is defined as: ". . .each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute. . . to make rules or to determine contested cases." Tenn. Code Ann. § 4-5-102(1).

<sup>5</sup>We do not consider Image's post-dismissal petition for declaratory order submitted to TDOT, filed after the trial court's ruling that Image had failed to exhaust its administrative remedies, as meeting the exhaustion requirement because it was not requested before the declaratory judgment was sought and facially does not meet the requirements for such a petition, as explained *supra*. See *Davis v. Campbell*, 947 S.W.2d at 156.

**Court:** You can't put a billboard up unless you've got a license from the state; is that correct?

**Image:** . . . You need the permit from the State of Tennessee Department of Transportation plus your local zoning; okay? The problem - - what makes this case justiciable and why I go into the billboard thing in the complaint . . . I just didn't get a permit. . . The only reason that Image was denied a permit was because of spacing requirements between other existing billboards. . . If you are within a thousand feet, you are denied a permit. And that is what happened to Image here. . . .

**Court:** Well, you take the position, though, that if they are holding a license, then-- from the Tennessee Department of Transportation, that they should not-- that the license should not have been granted because the railroads have no legal authority to lease land to billboard companies, is that correct?

**Image:** Well, but this case is not about the license. You need two things to put up a billboard . . . You need these permits that we are talking about, and you need a property interest. This case is not about permits; this case is about property interest.

**Court:** Well, suppose this Court said that they can't put up any more billboards along I-40, for instance. And there is a statute where there is a scheme set up for a citizen to go there and get a permit; and if the citizen meets the requirements, the citizen is given the permit. How can you go around the Department of Transportation - - even though you say 'Well, it doesn't involve anything like that.' - - but how can this Court just pretty much nullify the statutory scheme and say, CSX, you can't do that anymore, because you don't have authority to lease any land.

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**Court:** . . . [T]aking your position, isn't that legally wrong for the Department of Transportation to continue to issue those permits when the railroad does not own the property? Seems like, to me, you'd have to bring that to their attention and ask for some kind of declaratory relief because you have an interest there. And you are involved in the - - your client's involved in the billboard business; and if the state is illegally issuing permits to other entities and denying your client the same right or privilege, it seems to be that you'd have to correct the Department of Transportation, get them to try to correct themselves before you come to court and ask the Court to do it.

The trial court correctly perceived that, in fact, Image sought relief under the Billboard Regulation and Control Act of 1972 ("Billboard Act") and challenged the way the Act was interpreted and applied by TDOT. The Billboard Act, Tenn. Code Ann. § 54-21-101, et seq., serves

a similar purpose to that of the federal statute on which it is based, 23 U.S.C. § 131. Subsection (a) of that statute states such purpose:

The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

The Act requires a permit for the erection and maintenance of any outdoor advertising, including outdoor signs and billboards, within specified distances of interstate and primary highway systems. Tenn. Code Ann. § 54-21-104(a). Permits are to be obtained by application to the Commissioner of the Department of Transportation. Tenn. Code Ann. § 54-21-104(b). Tenn. Code Ann. § 54-21-112 confers full authority to the Tennessee Commissioner of Transportation to promulgate and enforce any and all rules and regulations necessary to carry out the provisions of the Billboard Act and 23 U.S.C. § 131.

The distance requirement referred to by Image is included in the rules promulgated by the Commissioner and states, “no two structures shall be spaced less than 1000 feet apart on the same side of the highway.” Chapter 1680-2-3-.03(4)(i)(I), Rules of the Tennessee Department of Transportation -Maintenance Division “The Control of Outdoor Advertising.”<sup>6</sup> The ownership or interest in land requirements also referred to by Image are found at Chapter 1680-2-3.03 (1)(a) (5)(I), which requires additional information be included in the permit application:

A detailed sketch of the location must be provided. . . The applicant must either show proof of ownership of the property or submit a valid land lease or an affidavit signed by the property owner stating that permission has been given to erect this particular outdoor advertising device. . . If a permit is issued, then one the above types of permission must remain in effect for the life of the permit. If not, the permit may be revoked.

Here, the trial court correctly found that the proper agency to initially complain about the permitting practices between CSX and billboard companies was TDOT, the department charged with the regulation of outdoor advertising signs under the Billboard Act. Before seeking judicial review, Image should have attempted to resolve its grievances through agency procedures. The reasons for requiring aggrieved parties to exhaust administrative remedies are well settled:

When a statute provides an administrative remedy, one must exhaust this administrative remedy, prior to seeking relief from the courts. When not mandated by statute, exhaustion is a matter of judicial discretion. The exhaustion doctrine serves to prevent premature interference with agency processes, so that the agency

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<sup>6</sup>The TDOT rules also set out specific rules to address zoning, size, and lighting requirements. *Id.*

may (1) function efficiently and have an opportunity to correct its own errors; (2) afford the parties and the courts the benefit of its experience and expertise without the threat of litigious interruption; and (3) compile a record which is adequate for judicial review.

*Thomas v. State Bd. Of Equalization*, 940 S.W.2d 563,566 (Tenn.1997).

State statute requires that a party seeking judicial relief in the form of a declaratory judgment regarding the validity or applicability of a statute, rule, or order within the primary jurisdiction of an agency first seek a declaratory order from the agency. Thus, the judicial exhaustion doctrine need not be considered. However, we note that TDOT is uniquely qualified to review Image's complaints since they involve interpretation of the Department's rules adopted pursuant to its statutory authority and responsibility.

To avoid the exhaustion of remedies requirement and the specific language of Tenn. Code Ann. § 4-5-225, Image must have a private right of action under the Billboard Act to allow it to proceed directly to court.

Where a right of action is dependent upon the provisions of a statute, our courts are not privileged to create such a right under the guise of liberal interpretation of the statute. Only the legislature has authority to create legal rights and interests. Thus, the burden of establishing the existence of a statutory right of action lies with the plaintiff.

In determining whether the legislature intended to grant a statutory right of action, we begin by examining the language of the statute. If no cause of action is expressly granted therein, then we must determine whether such action was intended by the legislature and thus is implied in the statute. To do this, we consider whether the person asserting the cause of action is within the protection of the statute and is an intended beneficiary.

*Premium Finance Corporation of America v. Crump Insurance Services of Memphis, Inc.*, 978 S.W.2d 91, 93 (Tenn. 1998). Review of the overall structure and purposes of the Act in question helps in making this determination. *Id.* The statute in question was designed to protect the public's interest, not that of outdoor advertising companies. Additionally,

Where an act as a whole provides for governmental enforcement of its provisions, we will not casually engraft means of enforcement on one of those provisions unless such legislative intent is manifestly clear.

*Id.*, 978 S.W.2d at 94. In *Premium Finance*, the Supreme Court found that a statutory private cause of action was not necessary to further the legislative purpose of the statute at issue because, in part,

the industry involved was heavily regulated and a noncomplying company would face regulatory sanctions. *Id.* at 94.

The Billboard Act does not grant a private right of action for its enforcement; instead, it clearly confers full authority to the Commissioner of TDOT to enforce and regulate outdoor advertising in the state. Tenn. Code Ann. § 54-21-112. Image must seek enforcement through the agency.

Because no private right of action exists to enforce the Billboard Act, and because Image failed to exhaust the administrative remedy statutorily required as a prerequisite to its declaratory judgment action, the trial court correctly dismissed Image's complaint for failure to state a claim upon which relief could be granted.

### III. LAMAR'S COUNTERCLAIM AND THIRD PARTY COMPLAINT

Lamar complains that Mr. Mello formed Image, a competing outdoor advertising business, using the knowledge and insight of the industry which he gained in the course of his representation of Lamar and further used such knowledge to create the factual grounds for his lawsuit against Lamar. The trial court dismissed Lamar's counterclaim against Image and its third party complaint against Mr. Mello pursuant to Tenn. R. Civ. P. 12.02(b), finding that neither complaint alleged facts, which taken as true, state a claim for relief.<sup>7</sup> We agree.

The primary problem with Lamar's claims lies in the allegations made in its complaints. Specifically, Lamar plead the following relevant facts in support of its claims:

6. Attorney Ralph W. Mello represented Lamar in some condemnation actions brought by the Metropolitan Development and Housing Agency in Davidson County from 1998 through early 1999. Mr. Mello signed pleadings which were filed in Davidson County Circuit Court as counsel of record for Lamar, and actively represented Lamar in the litigation and eventual settlement of those condemnation actions.

7. In the course of his representation of Lamar, Ralph W. Mello had numerous conversations with corporate counsel for Lamar concerning the outdoor advertising industry. Lamar is the first client Ralph W. Mello represented in the industry, and **corporate counsel for Lamar educated Ralph W. Mello concerning such issues as valuations of outdoor advertising structures and the means through which Lamar and others in the industry obtain leasehold interests for the erection of outdoor advertising.** (emphasis added).

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<sup>7</sup>Lamar argues that the claims against counter-defendant Image are based on the assertion that Ralph Mello owns and controls image, and therefore the fiduciary duty he owes to Lamar is imputed to Image, and the actions undertaken by Ralph Mello in breach of such duties must also be imputed to Image.

8. Soon after the conclusion of the condemnation actions in which Ralph W. Mello represented Lamar as counsel of record, Ralph W. Mello organized Image Outdoor Advertising, Inc. and went into business for himself in the outdoor advertising industry. Ralph W. Mello thereby went into competition against his client Lamar in the Davidson County, Tennessee area.

Based upon these facts, Lamar alleged that Mr. Mello owed a “fiduciary duty to Lamar by virtue of the attorney client relationship” and that the duty continued after the conclusion of the cases in which Mr. Mello represented Lamar. Specifically, Lamar argues that Mr. Mello owed a duty to preserve Lamar’s “confidences and secrets.”<sup>8</sup> Lamar concludes that by going into direct competition with Lamar, Mr. Mello breached his duty by using the confidences and secrets of Lamar for his own financial gain. Lamar also asserts that by representing Image in this lawsuit, Mr. Mello also breached his ethical obligations.

Lamar is correct, and Mr. Mello agrees, that the obligation of a lawyer to preserve the secrets and confidences of a client continues even after the termination of the attorney client relationship. Tenn. R. S. Ct. 8, EC 4-6. That obligation is one of the bases for the limitations on future representations. Even where a direct conflict does not exist, successive representation may be prohibited because of the danger that a lawyer may divulge or use on behalf of the new client confidential information obtained from the former client. *See Cliburn v. Blackwood*, 46 S.W.3d

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<sup>8</sup>Canon 4 of the Code of Professional Responsibility states that “a lawyer should preserve the confidences and secrets of a client.” The following disciplinary rule enunciates the attorney’s duty:

DR 4-101. Preservation of Confidences and Secrets of a Client- (A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relations that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

- (1) Reveal a confidence or secret of a client.
- (2) Use a confidence or secret of a client to the disadvantage of the client.
- (3) Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of the client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect the lawyer’s fee or to defend the lawyer or the lawyer’s employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

177, 183 (Tenn. 2001); *State v. Coulter*, 67 S.W.3d 3, 29 (Tenn. Crim. App. 2001); *Mills v. Crane*, No. 66, 1987 Tenn. App. LEXIS 3179, at \*11-\*12 (Tenn. Ct. App. Apr. 10, 1987) (application for permission to appeal denied July 27, 1987 & Aug. 31, 1987). However, Lamar has failed to identify any client confidences that Mr. Mello learned during his representation of Lamar and which he may have used.

A confidence is information protected by the attorney-client privilege. A secret is other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client. Tenn. R. S. Ct. 8, DR 4-101(A). Under the ethical rules applicable to lawyers, a lawyer may neither disclose nor use to the client's disadvantage or the advantage of the lawyer or a third person any client confidence or secret.

Absent from Lamar's pleadings is any mention of the confidences and secrets purportedly shared with Mr. Mello during his short representation of Lamar in specific condemnation cases. Rather, Lamar merely alleges that counsel for Lamar "educated" Mr. Mello on issues of valuations of outdoor advertising structures and the means through which Lamar "and others" in the industry obtain leasehold interests for the erection of outdoor advertising and that Mr. Mello had conversations with counsel for Lamar "concerning the outdoor advertising industry." Lamar further alleges simply that Mr. Mello gained and used "knowledge and insight into the outdoor advertising industry."

The scope of information deemed "secrets" under the Code of Professional Responsibility is broad, as is the scope of "confidential client information" under the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59 (2000). However, even under the broad Restatement definition, *i.e.*, "information relating to representation of a client, other than information that is generally known," some information is excluded. One such type, evident from the wording of the definition, is information that is generally known.

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000).

Interestingly, Lamar concedes that others in the industry obtain leasehold interests in the same manner, *i.e.*, leasing of railroad rights-of-way. In other words, it is not a method unique to Lamar or unknown to its competitors. It is no secret. Moreover, Lamar's arrangements with the railroads are on file as a public record with the TDOT by virtue of the billboard permitting process discussed *infra*.

In addition, comments to the Restatement establish that information concerning the law, legal institutions, and similar matters is not confidential client information.

Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. Such information is part of the general fund of information available to the lawyer.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. e (2000).

The requirements for obtaining billboard permits are set out in duly promulgated rules of the department charged with authority over billboards. Thus, they are part of the law. Similarly, restrictions on the use of certain types of railroad easements is also part of the law. *See, e.g., Buhl v. U.S. Sprint Communications Co.*, 840 S.W.2d 904 (Tenn. 1992).

Lamar failed to make sufficient factual allegations that it disclosed confidential information to Mr. Mello that he subsequently disclosed or used to Lamar's disadvantage. Consequently, Lamar's complaints were properly dismissed.

There is also some question about the legal basis for Lamar's complaints. Because the Code of Professional Responsibility does not "undertake to define standards for civil liability of lawyers for professional conduct," Tenn. R. S. Ct. 8, Preamble, it does not create a private cause of action for damages. *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400, 404 (Tenn. 1991). Questions of compliance with the duties of a lawyer arise primarily in malpractice actions or motions to disqualify an attorney from representation in a pending action. Lamar's complaint falls into neither of these categories.<sup>9</sup>

Instead, Lamar asserts its claim is based on breach of fiduciary duty and agency concepts. Although some states recognize breach of fiduciary duty as a separate tort distinct from a cause of action for professional negligence or malpractice, *see, e.g., Stanley v. Richmond*, 41 Cal. Rptr.2d 768, 776 (Cal. Ct. App. 1995), we have been cited to and have found no Tennessee case recognizing that cause of action against a lawyer for conduct based exclusively on an alleged violation of the Code of Professional Responsibility.

Generally, a person who stands in a confidential relationship to another and abuses that confidence or obtains an advantage at the expense of the confiding party through undue influence will not be permitted to retain the advantage. *Turner v. Leathers*, 191 Tenn. 292, 298, 232 S.W.2d. 269, 271 (1950) quoting Pomeroy's *Equity Jurisprudence*, 5<sup>th</sup> Ed., Vol. 3, § 956, p. 792. This principle applies to the whole reach of confidential and fiduciary relationships. *Security Fed.*

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<sup>9</sup>Although Lamar had an obligation to move for Mr. Mello's disqualification "at the earliest practical opportunity," *Lazy Seven Coal Sales, Inc.*, 813 S.W.2d at 410, the record does not include any motion for disqualification. Instead, Lamar filed its countercomplaint and third party complaint.

*Savings and Loan Assoc. v. Riviera*, 856 S.W.2d 709, 713 (Tenn. Ct. App. 1992). An attorney-client relationship is a confidential and fiduciary one. *Id.* Similarly, an agent who breaches a fiduciary duty to his principal in the performance of the principal's business can be liable for damages occurring as a result of the breach of duty, *Pridemore v. Cherry*, 903 S.W.2d 705, 707 (Tenn. Ct. App. 1995).

However, the duty alleged to have been breached in the case before us is one imposed and established by the Code of Professional Responsibility. The duty to maintain client confidences and secrets and not to use them after the termination of the attorney-client relationship is part of the ethical rules that govern attorney conduct. The Tennessee Supreme Court has the exclusive power to regulate the conduct of lawyers in the State of Tennessee. *See In re Petition of Burson*, 909 S.W.2d 768, 773 (Tenn. 1995); *Smith County Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984). Our Supreme Court has not determined that a cause of action for breach of fiduciary duty lies against an attorney when the only allegation is a breach of the Code of Professional Responsibility. Because we have found that Lamar's complaints do not provide a sufficient factual basis for its allegations that Mr. Mello used client confidences or secrets, we need not determine whether Lamar could bring a cause of action for breach of fiduciary duty, separate from a malpractice action, against an attorney.

Because Lamar failed to state a claim for relief, we affirm the trial court's decision dismissing Lamar's countercomplaint and third party complaint.

### CONCLUSION

We affirm the trial court's judgments in both appeals and remand the cases to the trial court for whatever further proceedings may be required. Costs of the appeal are taxed equally between Image Outdoor Advertising, Inc. and Lamar Advertising Company, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE